

FOREWORD TO THE 1981 EDITION

The 1981 edition of the Wisconsin Jury Instructions-Civil is published with great pride by the Department of Law, University of Wisconsin-Extension.

This new edition contains both physical changes in its format and substantive changes in its content. The pages are larger and easier to read. They are similar in size to papers commonly used by judges and lawyers. Additionally, the large format shortens the Department's printing time and, thus, allows for more timely supplementation. In terms of substantive changes, approximately 70 new or revised instructions have been added. Moreover, the comments to approximately 100 instructions have been updated. Material which was not revised or updated is republished without change. Thus, the 1981 edition contains all of the presently approved material produced over the 22-year history of the project.

The approval date for content published thorough 1978 is indicated by the copyright at the bottom of the page. For new and revised items approved since 1978, the first paragraph of the comment indicates the year of Committee approval.

Prefaces from two earlier editions are included because they are important. In the preface to the 1978 supplement, Professor John E. Conway, then editor of the project, described the format and made recommendations for its use. Also included in its entirety is the introduction which was written in 1960 by Judge Andrew W. Parnell and accompanied the original edition. Special note should be made of the claims and disclaimers so eloquently set out by Judge Parnell, for they are as timely for this new edition as they were originally.

The Wisconsin Jury Instructions-Civil is the product of a cooperative effort between the Civil Jury Instructions Committee and the Department of Law, University of Wisconsin-Extension. This joint enterprise has continued without interruption since 1959 when the Board of Circuit Judges established the Circuit Judges Civil Jury Instructions Committee. Following the reorganization of the Wisconsin judicial system in 1978, the Committee's name was changed to the Civil Jury Instructions Committee. The first edition of Wisconsin Jury Instructions-Civil was published in December 1960, and there have been twelve supplements.

Since its inception in 1959, this project has benefited from the valuable and enthusiastic contributions by the members of the Committee who are listed on page iii. The Department expresses its appreciation to them.

Additionally, the Committee wishes to specially recognize the valuable work of nine individuals: Judges M. Eugene Baker, Helmuth F. Arps, Edward M. Duquaine, Bruce F. Beilfuss, Andrew W. Parnell, Harvey L. Neelen, Richard W. Orton, William I. O'Neill and Professor John E. Conway.

The Extension Law Department is proud of the staff support it has contributed to the project. Currently, Attorney Scott C. Minter of this Department provides research support for the Committee and Roger P. Bruesewitz, publications editor, performs the

copy and technical editing tasks. In the past, Professors William Bradford Smith, Frank Mallare, August Eckhardt, and Arnon Allen assisted in the initial years of the project. Professor John Kidwell of the Law School assisted as advisor in the drafting of the contracts instructions. Under the chairmanship of Arnon Allen, the Department continued its close partnership with the Committee. Editing and production responsibilities were handled by Barbara Muckler from 1966 until 1978.

It is the continuing goal of the Committee and the University of Wisconsin-Extension that this publication remain a valuable resource for civil litigation in this state. The original Committee's dedication and commitment to this publication continues to be the model for present efforts.

March 1981

Stuart G. Gullickson
Professor and Chairman
Extension Law Department

PREFACE

TO THE 1978 SUPPLEMENT

It must be emphasized that in very few cases will it be possible to use these instructions verbatim. They are fundamentally models, or checklists, or minimum standards. A distinction must be drawn between general instructions, which might be used unchanged in many cases, and the substantive law instructions, which could hardly ever be used unchanged. As Justice Currie stated in Sharp v. Milwaukee & Suburban Transport Co., 18 Wis.2d 467, 118 N.W.2d 905, 912 (1963): "While the instructions embodied in Wis JI-Civil — Part 1 are a valuable tool to the trial courts, charges to the jury sometimes require more than a compendium of extracts from these uniform instructions without varying their wording to fit the facts of the particular case at hand." For the purpose of clarity, a particular instruction is limited to one ground of negligence; but in a trial where the evidence warrants submission of several grounds which are related, it may be necessary to modify the instructions suggested here to accommodate not only the facts of the case but also the impact of the two grounds of negligence on each other.

The general instructions are broken down into descriptive categories and presented in the logical order in which they are usually given within each category. Three-digit numbers are used for the general instructions and four-digit numbers for those dealing with substantive law. In the substantive law areas, they are arranged numerically. The gaps between the numbers have been left purposely to permit the insertion of later material. Where there is no remaining space between two whole numbers (see, *e.g.*, numbers 1026 and 1027) and it is necessary to insert another instruction, a decimal number is used (1026.5). Instructions which are alternatives bear the same number, with one having a "A" suffixed (*e.g.*, 1325 and 1325A). Time taken to consult the index is always well spent.

The user should always read the "Comment" appearing below the instruction in order to learn of any special conditions prerequisite to its use or other cautionary or explanatory material. In the body of the instructions will appear editorial directions enclosed in brackets and centered upon the page. Such directions tell the user to, for example, select a proper paragraph, or to insert a paragraph from a different instruction, or to read the verdict question with which the instruction deals.

When there are alternative words or phrases which may be employed, the user is alerted by italics, parentheses, or brackets. Alternative paragraphs are denoted by brackets at the beginning and end of each alternative paragraph.

The book itself may be cited as "Wis JI-Civil," adding the appropriate number, *e.g.*, "Wis JI-Civil 405." However, it is hoped that attorneys will not refer to any of these instructions by citation in any of their requested instructions unless they are requesting the court to give the instruction verbatim as it appears in the book. It is suggested that if an attorney drafts an instruction of his own, adapting one of these instructions to his particular case, he should refer the judge to the model instruction by writing beneath his draft: "See Wis JI-Civil ____."

This book is published in loose-leaf form to facilitate its expansion at minimum publishing expense and to permit revision of instructions and comments as necessary. The usefulness will be materially increased if the members of the Bench and Bar who make use of this book will promptly report any errors they may find, either typographical or in expression of the law. We welcome your corrections or suggestions and ask only that you give us applicable citations wherever possible.

March 1978

John E. Conway
Editor

INTRODUCTION TO THE 1960 EDITION

I have been asked to write an introduction to this book. I am pleased and proud to do so. I have lived intimately with this project for two years and I have seen it develop and grow from the embryo of an idea to this stage of its present debut; and I hope, in discussing it, I can confine my anticipation of its prospects within the bounds of modest proprieties.

In January of 1959, still in the wake of a wave of enthusiasm that engulfed me following my attendance at a panel discussion on uniform jury instructions in civil cases, I delivered a paper on uniform instructions to the Board of Circuit Judges. The panel was sponsored by the Judicial Administration Section of the American Bar Association at its annual convention at Los Angeles, in August of the preceding year, presented by four Superior Court judges and two trial attorneys of Los Angeles County.

California has been a pioneer in this work and has set up a standard that challenges its followers and defies its imitators. Its published works on civil and criminal instructions have national distribution and have been accorded a reception and acceptance that befit their quality.

To my knowledge, at least three of our neighboring states — Illinois, Iowa, and Minnesota — spurred by the California example, have undertaken similar projects and are in various stages of progress with respect to it.

In my paper to the Board I made certain recommendations to it, urging its action to initiate a like undertaking in our state. The Board was reminded that:

The task seems monumental, but it surely is not insurmountable. It is, and should be, a function of this Board to set up the original machinery looking to the production, in due course, of uniform jury instructions in civil cases in our state. The arguments for it are patent and predominate. The ideal of progress and improvement in the judicial administration of our state should ever possess us and make us leaders in that field.

In cooperation with Professor William Bradford Smith, of the University of Wisconsin Extension Law Department, and Professor John E. Conway, of the University of Wisconsin Law School, the Board of Circuit Judges organized and conducted two seminars on jury instructions in June of 1959. These seminars did not produce immediate or recognizable results but presented excellent forums for the discussion and appraisal of the need and merits of the uniform jury instructions in our state. The interest, desire, and enthusiasm of the participating members ignited the inspirational spark that launched the program. It soon became apparent during the course of the seminars, from the discussions had, the ideas expressed, the questions asked, and the details suggested, that some overall plan would have to be formulated to bring organization, direction, and

production to this mass of helpful but nebulous intentions to produce a book worthy of the efforts expended in its preparation, production, and distribution.

Following the seminars, several meetings were held, by the chairmen and the executive committee of each seminar group, with Professor Smith and Professor Conway. At these meetings, the preliminary details of sponsoring, publishing, authoring, and editing were tentatively resolved.

The results of the seminars and the subsequent meetings were duly reported by the respective chairmen to the Board at its fall meeting. By proper resolutions, the Board created a permanent committee on jury instructions and approved the preliminary agreements that the committee would constitute the authoring personnel, Professor Conway would serve as editor, and the Extension Law Department would be the sponsor and publisher, with all rights and profits reserved to it, on its moral commitment that the prospective profits, if any, would be employed by it to the furtherance of better judicial administration in our state.

The committee was appointed in October and, at the call of the chairman, held its first meeting in Madison the latter part of that month. The members of the supreme court were invited to join the committee at a noon luncheon, and our proposals were outlined to them. We neither asked nor expected their active participation but did invite their advice, approval, and encouragement, which we received in full measure.

We decided to ask the president of the State Bar and the chairman of the Board of County Judges to appoint committees from their respective groups so that we could obtain the benefit of outside and current criticisms of our work as it progressed. These committees were appointed, and the publisher furnished current material to their members and to each member of the Board of Circuit Judges. Their criticism were fully invited but two conditions were imposed: first, that they be in writing; and, second, that they be supported by pertinent cited authorities.

We also determined the time, frequency, and places of our meetings, the procedures to prepare the agenda of our meetings, the assignments for authorship, the manner and form of submission and approval, the editing details, and the circulation of our material.

The committee met nine times, on the last Friday of each month except December. The meetings were never less than one, frequently one and one-half, and sometimes two full days in duration. We met at Madison in October, at Oshkosh in November, at Milwaukee in January and February, at Wisconsin Rapids in March, at Green Bay in April, at Kenosha in May, at Lake Delton in June, and at Sturgeon Bay in July.

The attendance at our meetings was excellent and exceptional. Quite early in our undertaking, Judge Orton was temporarily lost to our committee because of illness; and Judge Arps was invited, and agreed, to join us. The members hope that the causes that kept Judge Orton from active participation will soon be removed so that we can again benefit from his persuasive and challenging criticisms and his competent insistence that what is right in substance and statement should be adopted, that which is not, rejected.

It might be of general and passing interest to relate the manner of our approach to our work and the procedure we followed in accomplishing it. We started out by reconsidering and reevaluating the two hundred or more instructions gathered for and submitted to the seminar groups by Professor Conway. Assignments of specific proposals for instructions were timely made to each member. The assigned member had the responsibility of preparing a draft of each proposed instruction, with an accompanying brief, as comments, supporting the principle of law sought to be enunciated. Copies of his preparations were mailed to the editor, the publisher, and each committee member prior to our meeting. At the meeting, the author was called upon to read his manuscript and be prepared to fend and defend against the analytical darts of criticisms bound to be aimed at the heart of his handiwork. If it survived the challenge, it was tentatively approved. If amendments or corrections were suggested, and adopted, it was approved as amended. If it failed both tests, it was reassigned. On tentative approval, the proposed instruction was submitted to the editor for editing and arrangement of comments, and, when completed, returned by him to the author for his approval and the eventual approval by the whole committee.

By taking full and strict account of the time allotted for our meetings, we were able to process an average of 17 instructions on each assignment, giving us, as a result of our first year's efforts, about 150 approved instructions.

I speak for the members of the committee, the editor, and the publisher and hope they will not be denied the indulgence of such pride in their work as they, and it, can in good grace and becoming humility enjoy.

We made claims and disclaimers about our work.

We modestly claim that:

1. This book is the first tangible realization of a long-abiding dream of the Board of Circuit Judges relating to uniform jury instructions.
2. It is but a part of a projected end result.
3. It will be a readily available service to the trial judge in time of pressure of meeting deadlines on preparation of instructions.
4. It may be conveniently employed by the trial judge while the battle still rages about him, in his presence and hearing, deprived, as he then is, of the leisure and tranquility of legal research.
5. It will bring confidence to the new trial judges and remove for them the need of desperately seeking and gathering a disorganized file of prolix, unedited, and miscellaneous instructions from the usual sources of supply.

6. It will be an aid to the trial attorneys in preparing specific and pertinent requests for instructions.
7. It will avoid for the court the almost hopeless task of timely and correctly appraising, evaluating, and avoiding partial, slanted, incomplete, or inaccurate submitted instructions at the close of the trial.
8. It will minimize the ever-present hazards of hasty, ill-considered, or erroneous instructions.
9. It will reduce the frequency of retrials for avoidable instructional errors.
10. It will make a small but fair contribution to the betterment of judicial administration in our state trial courts.

We forcefully disclaim that:

1. It is free from error, completely accurate, or a model of perfection in form, statement, or expression.
2. It is presented as a standard of instructions pattern to be blindly and unquestionably followed.
3. It is the final answer to all instructional problems.
4. It will remove all need for the trial judge's industry and ingenuity in the preparation of instructions.
5. It has grown to the full stature of its possibilities.
6. It will lessen the duties of the trial attorneys with respect to the preparation and submission of timely written instructions.
7. It is above criticism.
8. It forestalls any constructive suggestions for its improvement.
9. It is as clear, concise, and correct as it can or ought to be.

We hope it will be accepted for what it is, a first-born issue, conceived in hope and inspiration, born of the labors of dedicated men, to be reared in the delicate and considerate atmosphere of parental attachments.

This is what we have produced within the bounds of our time and talents. We hope it will be received and accepted as a first effort which, if nurtured by industry, encouraged by support, and improved by the co-operative efforts of Bench and Bar, may in time approach the ideals of its kind.

Our joint appreciation is extended to our Board for the entrustment of this assignment to our committee; to the members of the supreme court for their interest and encouragement in our work; to the Extension Law Department of the University of Wisconsin for its help and faith in our undertaking; to Professor William Bradford Smith for his initiative, his industry, and his promotional ability; to Professor Allen; to the secretarial staff; and to Professor John E. Conway for his patience, his counsel, his knowledge, and his editorial skill.

I express my personal thanks to all of the members of the committee for their confidence, their fidelity, and the generous application of their time, efforts, and talents to this cause.

A. W. Parnell, Chairman
Jury Instructions Committee